

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO**

In the Matter of)	Case No. 06-PM-12813-PEM
)	(S122649)
JAMES DARYL WHITE,)	DECISION AND ORDER GRANTING
)	MOTION TO REVOKE PROBATION
Member No. 73139,)	
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

Based upon alleged probation violations, the Office of Probation (OP), represented by Terrie Goldade, filed a motion pursuant to Business and Professions Code sections 6093(b) and 6093(c)¹ and rules 560 et seq. of the Rules Proc. of State Bar² to revoke the probation of James Daryl White imposed by the Supreme Court in its April 23, 2004, order in Supreme Court matter S122649 (State Bar Court case no. 01-O-3715), as modified by its order filed August 4, 2005 (collectively, Supreme court orders). Respondent did not participate in this proceeding although he was properly served with the motion on June 12, 2006, by certified mail, return receipt requested, at his State Bar membership records address and two alternate addresses, of which one of the latter was in Florida.

For the reasons stated below, this court finds by a preponderance of the evidence that respondent wilfully failed to comply with the terms of his probation. (Section 6093(c).) As a result, the court grants OP's motion to revoke respondent's probation and its request to involuntarily enroll him as an inactive member of the State Bar pursuant to section 6007(d). The court recommends that respondent's probation be revoked, that the previously-ordered stay be lifted and that he be actually

¹Unless otherwise indicated, all further references to section refer to this source.

²All further references to rule are to this source.

suspended from the practice of law for two years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct,³ among other things.

III. SIGNIFICANT PROCEDURAL HISTORY

On July 10, 2006, the court filed an order taking this matter under submission that same date.

On July 12, 2006, the State Bar filed a request for judicial notice along with copies of respondent's first two disciplinary records.

On its own motion, the court vacates its July 10 order and the submission date, reopens the record to allow consideration of the request for judicial notice and takes the case under submission effective July 12, 2006.

III. FINDINGS OF FACT

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 22, 1976, was a member at all times pertinent to the allegations herein, and is currently a member of the State Bar of California.

B. Probation Violations

On December 10, 2003, the State Bar Court filed an order approving the stipulation of the parties in case nos. 01-O-03715 and 02-O-15317 (Cons.), recommending discipline consisting of stayed suspension of two years and until he complied with standard 1.4(c)(ii) and three years' probation on conditions including actual suspension of nine months, among other things.

On July 26, 2005, respondent and the OP filed a stipulation to extend the time he had to complete the State Bar's Ethics and Client Trust Accounting Schools and submit satisfactory proof thereof either before he removed himself from inactive status or by May 23, 2006, whichever was

³Future references to std. or standard are to this source.

earlier. The State Bar Court approved this stipulation by order filed August 4, 2005.⁴

A copy of the stipulations and the State Bar Court's orders approving same were properly served upon respondent and/or his counsel at their State Bar membership records addresses by first-class mail, postage prepaid.

As previously noted, the Supreme Court accepted the State Bar Court's recommendations and ordered respondent to comply with the following conditions of probation, among others:

(a) During the period of probation, submit a written report on January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect to the OP, stating under penalty of perjury that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period; and

(b) Attend Ethics and Client Trust Accounting Schools and submit satisfactory proof thereof either before respondent removed himself from inactive status or by May 23, 2006, whichever was earlier.

The Supreme Court orders became effective on May 23, 2004 and August 4, 2005, respectively. Each order was properly served on respondent.⁵

On April 30, 2004, the OP wrote a letter to respondent reminding him of certain terms and conditions of his suspension and probation. It also warned respondent that failure to comply with the probation conditions could lead to further disciplinary proceedings. Enclosed with the letter were copies of the Supreme Court's order, the probation conditions portion of the stipulation and an instruction sheet and form to use in submitting quarterly reports.

⁴On its own motion, the court judicially notices its records regarding this order pursuant to Evidence Code section 452(d). The OP did not provide a copy of this document or of the Supreme Court order approving it in support of this motion.

⁵Although no proof was offered that the Clerk of the Supreme Court served its orders upon respondent, rule 29.4(a) of the California Rules of Court requires clerks of reviewing courts to immediately transmit a copy of all decisions of those courts to the parties upon filing. Moreover, it is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, this court finds that the Clerk of the Supreme Court performed his or her duty and transmitted a copy of the Supreme Court's orders to respondent immediately after each was filed.

The April 30, 2004 letter was mailed on that same date to respondent's official State Bar membership records address via the United States Postal Service with first-class postage prepaid. This is correspondence from OP to respondent was not returned as undeliverable.

The OP had contact with respondent by telephone or voicemail. On July 20, 2004, the OP called respondent to remind him that the quarterly report due July 10, 2004, had not been received. The next day, the OP received two voicemails from respondent stating that he was on vacation and that he would call when he returned. When they spoke on July 27, 2004, respondent stated that he would fax and mail that report.

On its own motion, the court judicially notices pursuant to Evidence Code section 452(h) that respondent's State Bar membership records address has been in New Orleans, Louisiana, continuously since January 10, 2002, and that Hurricane Katrina caused substantial damage and disruption of services there in the summer of 2005.

On October 6, 2005, respondent called and asked that the OP fax him a blank quarterly report form. That was done that same day.

On February 9, 2006, the OP left respondent a voicemail stating that he needed to send the quarterly report due on January 10, 2006. That same day, respondent left the OP a voicemail stating that he was still having trouble with mail in New Orleans and that he would send a copy of his log to show that he had mailed the quarterly report. On that same day, the OP called respondent and told him to mail the quarterly report again so that the OP had a report with an original signature. He did so. It was filed on February 17, 2006. Accordingly, the court does not find respondent culpable of untimely filing that report.

Respondent has not complied the conditions of his probation. He has not completed Ethics and Client Trust Accounting Schools and submitted proof of completion by May 23, 2006. He has not timely submitted seven quarterly reports as follows:

<u>Report Due</u>	<u>Filed</u>
July 10, 2004	July 27, 2004
October 10, 2004	October 11, 2004
January 10, 2004	January 18, 2004
April 10, 2005	August 1, 2005
July 10, 2005	July 29, 2005

October 10, 2005
April 10, 2006

October 14, 2005
April 14, 2006

On its own motion, the court judicially notices the State Bar's membership records pursuant to Evidence Code section 452(h). These records indicate that respondent was on inactive status effective January 1, 2004, and remained so until he was suspended effective May 23, 2004, pursuant to the Supreme Court's order in S122649. Accordingly, he should have, but did not, attend Ethics and Client Trust Accounting Schools and submit proof thereof to the OP by May 23, 2006.

As of June 9, 2006, respondent has not complied with the aforementioned provisions of the Supreme Court's orders.

IV. CONCLUSIONS OF LAW

Bad faith is not a requirement for a finding of culpability in a probation violation matter; "instead, a 'general purpose or willingness' to commit an act or permit an omission is sufficient. (Citations.)" (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Pursuant to section 6093(b) and (c) and rule 561, the court concludes that OP has demonstrated by a preponderance of the evidence that respondent wilfully violated the conditions of probation ordered by the Supreme Court in case number S122649. He did not timely submit the seven quarterly reports as set forth above nor has he submitted proof that he attended Ethics and Client Trust Accounting Schools by May 23, 2006.

V. AGGRAVATING CIRCUMSTANCES

In aggravation, respondent has three prior records of discipline. (Std. 1.2(b)(i), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct.) As previously discussed, discipline was imposed in Supreme Court case number S122649 for violations of rule 4-100(A) of the Rules of Professional Conduct and sections 6068(a) and 6125. In aggravation, there was a prior disciplinary record and misconduct involving entrusted funds. In mitigation, respondent had physical difficulties. Respondent and the State Bar entered into a stipulation to resolve this matter.

Effective June 6, 1992, the Supreme Court imposed discipline consisting of two years' stayed suspension and three years' probation on conditions, including nine months' actual suspension or until respondent returned to California to establish legal residency, whichever occurred last. The

order was based on three criminal convictions in Louisiana for possession of controlled substances. (Supreme Court case no. S025493 [State Bar Court case nos. 88-C-15619; 88-C-05856; 88-C-05857 (Cons.)].) There were no aggravating factors. Mitigating factors were no prior discipline, candor and cooperation and no actual harm. The case was resolved by stipulation.

By order filed February 17, 2005, the Supreme Court imposed discipline consisting of stayed suspension of two years and until respondent complied with standard 1.4(c)(ii) and three years' probation on conditions, including 30 days' actual suspension, for a violation of section 6103. (Supreme Court case no. S129798 [State Bar Court case no. 04-N-12908].) A prior disciplinary record was considered in aggravation. There were no mitigating factors. The case was resolved by stipulation.

Respondent engaged in multiple acts of misconduct. (Std. 1.2(b)(ii).)

Respondent significantly harmed the administration of justice as his failure to comply with the conditions of his probation made it more much difficult for the State Bar to appropriately monitor his in seeking to insure the protection of the public and the courts. (Std. 1.2(b)(iv).)

Respondent's failure to comply with the probation conditions after being reminded by the OP demonstrates indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).)

VI. MITIGATING CIRCUMSTANCES

No mitigating evidence was offered on respondent's behalf or received into evidence, and none can be gleaned from the record.

VII. DISCUSSION

Protection of the public and rehabilitation of the attorney are the primary goals of disciplinary probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452; *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298.) In determining the level of discipline, the court must consider the "total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted." (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.)

Section 6093 authorizes the revocation of probation for a violation of a probation condition, and standard 1.7 requires that the court recommend a greater discipline in this matter than that imposed in the underlying disciplinary proceeding. However, the period of actual suspension recommended in the instant case cannot exceed the period of stayed suspension imposed in the underlying proceeding. (Rule 562.) The extent of the discipline to recommend is dependent, in part, on the seriousness of the probation violation and respondent's recognition of his misconduct and his efforts to comply with the conditions. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.)

OP requests that respondent's probation imposed by the Supreme Court in its orders be revoked, that the stay of execution of the suspension previously imposed be lifted, and that respondent be actually suspended for two years and until he complies with standard 1.4(c)(ii), among other things. The court agrees.

In this matter, the court is concerned about respondent's failure to comply with the above-mentioned conditions of his probation. Respondent participated in his prior disciplinary proceeding and entered into a stipulation to resolve it. He was aware of the terms and conditions of his disciplinary probation, yet failed to comply with them.

"[A] probation 'reporting requirement permits the State Bar to monitor [an attorney probationer's] compliance with professional standards.'" (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, "an attorney probationer's filing of quarterly probation reports is an important step towards the attorney's rehabilitation." (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.) Thus, respondent's failure to file quarterly reports warrants significant discipline. Moreover, he did not comply with the condition that he successfully complete Ethics and Client Trust Accounting Schools and submit proof thereof.

Since respondent did not participate in these proceedings, there is no explanation for his misconduct.

In consideration of respondent's noncompliance with probation conditions that he agreed to despite the OP's efforts to secure his cooperation as well as his lack of participation herein, the court

does not believe it worthwhile to recommend again placing him on probation subject to conditions.

The prior disciplinary order “provided [respondent] an opportunity to reform his conduct to the ethical strictures of the profession. His culpability in [the matter] presently under consideration sadly indicates either his unwillingness or inability to do so.” (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728.)

Accordingly, the court finds good cause to GRANT the motion to revoke respondent’s probation and recommends the imposition of substantial discipline in this matter in the absence of evidence supporting an alternative.

VIII. DISCIPLINE RECOMMENDATION

The court hereby recommends that respondent’s probation in Supreme Court order S122649 (State Bar Court case no. 01-O-3715), as modified by its order filed August 4, 2005, be revoked, that the previous stay of execution of the suspension be lifted, and that respondent James Daryl White be actually suspended from the practice of law for two years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

It is not recommended that the Supreme Court order respondent to comply with rule 955(a) and (c) of the California Rules of Court. He filed the affidavit required by rule 955(c) on August 2, 2004, in connection with Supreme Court order S122649 and has not been entitled to practice thereafter.

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination as he was ordered to do so in connection with Supreme Court order S122649.

IX. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

X. ORDER REGARDING INACTIVE ENROLLMENT

Respondent is involuntarily enrolled inactive pursuant to Business and Professions Code section 6007(d). The requirements of section 6007(d)(1) have been met: Respondent was subject to a stayed suspension, was found to have violated probation conditions, and it has been recommended that respondent be actually suspended due to said violations.

IT IS THEREFORE ORDERED that respondent James Daryl White be involuntarily enrolled as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6007(d). This enrollment shall be effective three days following service of this order.

IT IS ALSO ORDERED that his inactive enrollment be terminated as provided by Business and Professions Code section 6007(d)(2).

IT IS RECOMMENDED that respondent's actual suspension in this matter commence as of the date of his inactive enrollment pursuant to this order. (Business and Professions Code section 6007(d)(3).)

Dated: August 3, 2006

PAT McELROY
Judge of the State Bar Court